(8)

No. 95-1853

Supreme Court, U.S.
FILED
SEP 9 1996
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF LAW PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

This case presents a grave question regarding the degree of personal power conferred upon the President of the United States by virtue of his office. *Amici curiae*, the law professors submitting this brief, have published and lectured widely on the subjects of constitutional law in general or on the separation of powers. This brief sets forth their considered views on the issues raised in this case. *Amici* sign this memorandum on their own behalf and not as representatives of their respective schools.

Counsel for both parties have consented to the filing of this brief. Their stipulation to that effect has been lodged with the Court.

STATEMENT

The last several decades have seen a number of sharp conflicts over the relative powers of the President and the government's other branches. Until now, the Executive's arguments have been limited to the assertion of an exclusive right on the part of the President or his subordinates to exercise some official governmental power that might otherwise—and perhaps more properly—be shared by two branches, or be within the sole domain of the legislature or the courts.

The immunity claim in this case is of a new and deeply troubling kind: for the first time, a purely personal privilege is said to attend the office of the presidency. Though the immunity now claimed is characterized as a mere temporal restriction, we believe the argument advanced to support it ignores one of the Constitution's overwhelmingly important goals: to control power. For that reason, the personal immunity claimed cannot be made to fit within the law governing the immunity of federal officials from personal liability for official conduct, or within a coherent view of the relationship between the President's powers and those of the other branches.

SUMMARY OF ARGUMENT

The arguments submitted in support of President Clinton's claim of immunity from suit start with the proposition that the burden is upon the plaintiff to demonstrate that subjecting the President to a suit for purely private conduct[1] will not impose

[1] The bulk of the private conduct at issue here is remote from the President's official functions, because it allegedly occurred before President Clinton entered office. These allegations must be distinguished from the potentially more difficult situation where the acts at issue were committed while the defendant was in office, but were private in the sense that they were unrelated to his performance of presidential duties.

We understand that one count of plaintiff's complaint, for defamation, does relate to actions taken by or on behalf of President Clinton while he was in office. We express no view on the extent to which the actions at issue in this Count are within the outer perimeter of his official duties, as that concept is defined by *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

an excessive burden upon the office of the presidency, or prevent the fulfillment of the President's duties. We submit that this is incorrect, and indeed that the burden is exactly reversed: we believe that this Court's separation of powers jurisprudence allows the President to escape the courts' jurisdiction in a civil action dealing with non-official conduct only if he can demonstrate that the assertion of such jurisdiction will interfere with the fulfillment of the duties of his office. We submit further that he has not made such a showing.

The President and his amici suggest that this burden rests on the plaintiff because she challenges only private conduct—so that there is, so it is said, no public interest in the plaintiff's enforcement of her rights. But we believe strongly that this stands the law, and indeed the entire concept of the rule of law, on its head: there is a compelling public interest in assuring that the law—particularly the Civil Rights Statutes, which enable the people to make real use of essential Constitutional liberties—is enforced uniformly, and that the presidency (or any other public office) is not used as a shield behind which an individual can hide to evade equal justice under the law. To ensure that public office is not so used, every public official seeking exemption from the ordinary course of judicial proceedings has the burden of demonstrating that the particular exemption he or she seeks is necessary to the execution of his or her public duties.

In contrast, President Clinton asserts immunity here not on the basis of any particularized conflict with his executive responsibilities. Rather, he says he is immune from this entire case, and from most other entire cases, merely as an incident of holding office, and for as long as he remains in office. Consideration of other cases that might be filed against a President, all well within the very general rule urged upon this Court by the President, the Solicitor General, and the

President's academic amici, makes clear that the claimed immunity is far too broad. Instead, the courts are empowered to, and should, protect the President from any specific action, such as a discovery or trial demand, that will actually interfere with the performance of his job.

Secondly, the President's personal lawyers—although not, as we discuss below, the Solicitor General—have approached this case as if it were the law that Presidents are immune from suits related to their conduct in office. Passages in the brief of the President's academic amici also lend some support to this proposition. Both the President and his amici, however, move from this premise to what they portray as the next question, namely whether the President is similarly immune from suit related to his private conduct.

The premise, however, is wrong, as the President's amici elsewhere essentially concede. *Nixon v. Fitzgerald* does not hold that the President cannot be sued for his official acts. And in fact, since the Watergate era, a consensus has developed among the lower courts that the President can be sued, while in office, over his official conduct. This amenability to suit even for acts regarding his official duties is a profoundly important mechanism for helping to ensure that the President remains under the law, which defines the scope of his official powers. In allowing this private action to go forward, this Court need not address the question whether the President is amenable to suit, for relief other than damages, for his official conduct. There is certainly no need for this Court to adopt the President's broad characterization of the immunity of his office. We urge this Court not to do so.

Rather than barring suits over the President's acts, *Nixon v. Fitzgerald* simply forecloses one potential remedy—an award of damages against the individual—in such proceedings. It does so for one reason: because the existence of that remedy might distort the President's judgment, preventing him from objectively assessing the factors he must consider as he goes about his duties.

Once it is apparent that *Fitzgerald* is about a particular remedy—personal payment of damages—for allegedly improper ***official*** action, we believe it clear that the case simply does not speak to the question now before this Court. Rather, a correct assessment of President Clinton's immunity claim must be derived from the separation of powers doctrine and specifically from the cases governing the President's amenability to judicial process. Those authorities, we submit, make no room for the President's claim that he is too busy while in office to be held accountable for his personal actions, whether taken while in office or previously. If any immunity is to be created beyond that provided for by existing law (and we perceive the need for none), it is for Congress to declare and respond to that need.

ARGUMENT

I. THE BROAD IMMUNITY FOR WHICH THE PRESIDENT AND HIS AMICI CONTEND WOULD BAR MANY CASES WHERE NO PRESIDENTIAL OR OTHER PUBLIC INTEREST WOULD BE HARMED BY SUBJECTING THE PRESIDENT TO LEGAL PROCESS

Because the President attempts to block this entire case, the immunity claim as presented to this Court is quite categorical. The President's argument is essentially that virtually no cases can go forward that relate to his private conduct or his conduct prior to taking office. In support of this result, he claims that the burden is upon the plaintiff to show irreparable prejudice if consideration of his or her claim were suspended for as long as the President remained in office.

The President's argument would require that he be exempt during his term of office from numerous obligations to which everyone else in the Nation is held, even though there is no compelling reason for such an exemption. If the President

were to default on an ordinary mortgage, for example, we can see no reason why the mortgage holder should be barred from enforcing its rights. They are only financial rights, it is true—and therefore significantly less pressing than the interests at issue in this case. The claim at issue here is also more significant than the situation that would be presented, for example, if a President were to fail to abate a nuisance on real property, with respect to which his neighbors would otherwise be entitled to injunctive relief. Yet the President's argument would bar such an action, as it would also prevent a President's spouse from seeking a divorce and child custody. As discussed below, the separation of powers cases impose upon the President the burden to show that calling him to account on any such matter would actually interfere with the conduct of his office. He does not explain how such a burden would be created by requiring him to defend actions of this kind, though the rule he contends for would bar each such case.

Certainly it would not be an excessive burden for the President's lawyers to file a motion to dismiss, for example, in any of these hypothetical cases, if the complaint were legally deficient. Such a motion would involve only purely legal issues, with respect to which the President's counsel would be able to act without any significant assistance from the defendant himself. If the motion were denied, an Answer—at least to a short complaint like the one filed in this case—would also be no great burden to prepare. Surely fulfillment of this duty cannot reasonably be expected to create an actual impediment to the President's execution of the duties of his office.

As we show in greater detail below, the President may very well be entitled to relief from a particular discovery demand at a particular time, or from a particular demand regarding the conduct or scheduling of a trial. But the law imposes upon the President the burden of demonstrating that he is entitled to any relief from the obligations imposed on any other citizen. This is true, this Court has explained, of the President's obligation to give evidence. *United States v. Nixon*, 418 U.S. 683,

709 (1974) ("the public * * * has a right to every man's evidence" even when that evidence is a confidential official public paper).

The President and his academic amici also suggest that the claim at issue here is less important than other claims might be, (see, *e.g.*, Brief Amicus Curiae of Law Professors at 16) and that requiring the plaintiff to wait up to six more years even to prosecute this claim is not a significant burden. We are surprised by this argument as much as we are convinced that it is wrong. Sexual harassment of the kind alleged here—a willful sexual degradation—affects the emotional well-being of anyone touched by it. There is clearly a strong public interest in enforcing the laws providing redress against such conduct by public officials, as Mr. Clinton was when the acts here at issue allegedly took place. Further, the interests at stake are not only highly important: they are deeply compromised by delay. That the plaintiff chose to remain silent about what she has alleged to have happened to her at the time is no basis for watering down the rights she has left when her anonymity is taken from her by actors totally outside her control.[2]

II. *NIXON v. FITZGERALD* BARS ONLY DAMAGE SUITS RELATED TO A PRESIDENT'S OFFICIAL ACTS, AND IT DOES SO ONLY BECAUSE THE PROSPECT OF PERSONAL LIABILITY FOR OFFICIAL CONDUCT WOULD PREVENT THE PRESIDENT'S OBJECTIVE ASSESSMENT OF THE FACTS HE SHOULD CONSIDER IN CARRYING OUT HIS DUTIES—NOT BECAUSE THE PRESIDENT IS TOO BUSY TO ATTEND TO PRIVATE LAWSUITS

In addition to attempting to shift the burden on this issue from the President to the plaintiff, Mr. Clinton's personal

[2] In making the above arguments, we of course take no position on whether the incidents described by the complaint actually took place.

lawyers have argued as if this Court's holding in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), requires that courts categorically avoid subjecting Presidents to liability for the performance of official duties. This is incorrect. It is essential that *Fitzgerald* be recognized for the narrow decision it is. It bars only a particular remedy. Its analysis is entirely consistent with the other cases discussing the lack of that particular remedy—and the existence of others—in cases charging official misconduct by other, less exalted, officials.

An official's liability to pay damages personally for misconduct while in office is one of the tools that can, under certain circumstances, help ensure that the "official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz v. Economou*, 438 U.S. 478, 489 (1978). "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Id.* at 506.

Whether such an action is permissible against any particular official, this Court has repeatedly made clear, turns on the nature of his or her duties. Thus the Court has adopted what it has called a "functional" approach to the immunity of federal officials for their official misconduct, *Fitzgerald*, 457 U.S. at 746, under which an immunity of "varying scope" is granted to federal officials depending upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

In the application of these principles this Court has recognized the danger that the execution of certain public offices might be disrupted if the prospect existed that the officeholder might have to pay damages personally for his or her official actions. Such liability, the cases say, could prevent the officer from acting "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967),

quoting *Bradley v. Fisher*, 13 Wall. 335, at 349 note (1872). See also *Ferri v. Ackerman*, 444 U.S. 193, 204-205 (1979) ("[t]he point of immunity for [officials entirely shielded from personal liability] is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion").

For this reason both state and federal judges have exactly the same kind of immunity as the President of the United States: they can never be held personally liable to pay damages for any official action taken within the scope of their duties. *Dennis v. Sparks*, 449 U.S. 24 (1980). So do prosecutors, *Burns v. Reed*, 500 U.S. 478 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976); grand jurors, *Imbler*, *supra*, 424 U.S. at 422-423; and other officers, both state and federal. See, *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Butz v. Economou*, 438 U.S. at 513 (administrative hearing officers); *id.* at 515 (government lawyers wielding powers analogous to those of a prosecutor).

None of the other officers who possess this immunity from personal damage suits for ***official*** acts has any protection, however, temporary or permanent, from suits related to his or her private conduct while holding office. This is so because the considerations barring personal liability for official acts have no bearing on the individual's amenability to suit for private conduct.

The brief submitted on the President's behalf nonetheless contends that *Fitzgerald* barred personal liability for official acts in part because the mere obligation to defend lawsuits—any lawsuits—would be an improper drain on the President's time. Similarly, the President's academic amici say *Fitzgerald* rested on several pillars, one of which was the drain on presidential time caused by private litigation.

The Solicitor General, by contrast, explicitly acknowledges that this argument is wrong: his brief admits that *Fitzgerald* "did not implicate—and the Court accordingly did

not discuss—the potential conflicts between a sitting President's performance of his constitutional responsibilities and the demands placed upon the defendant in a civil lawsuit." Brief for the United States as *Amicus Curiae* at 17.

The President's characterization of *Fitzgerald* is further undermined by the fact that no other immunity case is founded on the rationale Mr. Clinton advances—and neither, as the Solicitor General admits, is *Nixon v. Fitzgerald*: the case simply does not say that an immunity from damages actions should be created, even in part, because the mere fact of being sued would distract the President from his execution of his office. We submit that adoption of this argument would be tantamount to an assertion that, while performing his duties, the President is too busy to obey the law.

The *Fitzgerald* Court did indeed say that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Petitioner's Br. at 20; Brief for the United States at 15; Brief Amicus Curiae of Law Professors at 10, each quoting 457 U.S. at 751. But the "diversion" of which the Court spoke is the diversion of his attention a President would suffer if, ***in evaluating possible official actions***, he had to worry that one option or another might result in litigation in which he could be held personally liable. The *Fitzgerald* Court barred only those "private lawsuits" seeking to make the President pay out of his own pocket damages allegedly caused by his ***official conduct***. And the Court did so not because the President was too busy to attend to the cases in which such a claim might be made, so that he could not think about such cases and still have time to perform his duties, but because the prospect of the personal obligation to pay damages would distort his judgment ***as*** he did his job:

> As is the case with prosecutors and judges—for whom absolute immunity is now established,—a President must concern himself with matters likely to 'arouse the most intense feelings.' *Pierson v. Ray*, 386 U.S., at 554. Yet, as our decisions have recognized, it is in precisely ***such cases*** that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office. *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979). • • • Cognizance of ***this*** personal vulnerability could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

451 U.S. 751 (emphasis added). The arguments on behalf of President Clinton misapprehend this proposition, and attempt to transform it into the far different assertion—which this Court simply did not make—that private damages actions would force the President to think about such cases instead of thinking about his job. Neither *Fitzgerald* nor any other case of which we are aware so holds. Rather, the language in these cases about the burden of being a defendant reflects this Court's concern about the impact of litigation regarding official acts.[3] Any effort to make the cases say that the problem is litigation *per se* must begin by taking the relevant language out of context.

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[3] The one difference between the other immunity cases and *Nixon v. Fitzgerald* is that the possible harm from interference with the President's exercise of his discretion, caused by the imposition of personal liability for a faulty exercise of that discretion, is greater than it is from such interference in the exercise of discretion by other office holders. The concern about the unique scope of the President's duties, and of judicial interference therein, is shared by the other cases dealing with judicial review of discretionary ***official*** choices by the President himself, see *e.g.*, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1868), and manifests the courts' traditional reluctance to review the substance of the President's official decision making unless it is absolutely necessary. The short discussion in Part IV.B of this Court's *Fitzgerald* decision deals with this principle, and the result in that case is, in part, based on this consideration. See 457 U.S. at 754-755. But such reluctance has no place in this case, which does not relate to the President's official actions.

It also ignores the Court's admonition in *Fitzgerald* that "the sphere of protected action must be related closely to the immunity's justifying purpose." 457 U.S. at 755.[4]

Since *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), through *United States v. Nixon*, 418 U.S. 683 (1974), and extending beyond *Nixon v. Fitzgerald*, the lower courts have come to agreement on the principle that the President is amenable to suit, even in his ***official*** capacity, when his presence as a defendant is absolutely necessary. There is now "no room for any difference [of opinion] as to the President's amenability to legal process." *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 612 (D.C. Cir. 1974). If a plaintiff is entitled to relief and relief can only come from the President, the courts will require the President to afford relief. See, *e.g.*, *id.*; *Romer v. Carlucci* and *Western Solidarity v. Reagan*, 847 F.2d 445 (8th Cir. 1988); *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973); *Atlee v. Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972).[5]

The President's academic amici point out, correctly, that such judicial second-guessing of official presidential actions is to be avoided when possible; and indeed, both before and after *Fitzgerald*, the courts have used a variety of other tech-

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[4] The President's academic amici cite a concurrence by Justice Scalia, in *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992), in support of their broad reading of presidential immunity. But Justice Scalia argued only against the issuance of injunctive relief against the President ***related to the execution of his duties***, on the ground that "[i]t is incompatible with his constitutional position that he be compelled personally to defend ***his executive actions*** before a court.") *Id.* at 827 (emphasis added). The considerations animating this position are identical to those alluded to above, see n. 3 *supra*. As we explained there, those considerations are irrelevant in this case because no official action is at issue here.

[5] A thorough and useful analysis of the relevant precedents, of which there are many, is set forth in Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 Ky. L.J. 739 (1992).

niques, including standing, ripeness, and the political question doctrine, to avoid reaching the merits of cases against the President.[6] Even the President's amici do not say courts can never assert jurisdiction over the President in a case about his official duties.[7] And to our knowledge no case holds that the mere fact that he is President makes the Chief Executive immune from a suit challenging his official acts. See also L. Tribe, **American Constitutional Law** 278 (2d ed. 1988) (rejecting the view "that the President [is] beyond the pale of judicial direction").

We urge this Court not to reach a conclusion, or to embrace reasoning, inconsistent with this law. "In *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, Mr. Chief Justice Marshall commented (5 U.S. (1 Cranch) at 162-63) upon the importance of providing an individual with a remedy when he is injured by a violation of law and noted the availability of the King himself in Great Britain as a defendant in such a situation." *National Treasury Employees Union*, *supra*, 492 F.2d at 609.[8] A deci-

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[6] A relatively complete collection of these arguments appears in the various opinions in *Goldwater v. Carter*, 444 U.S. 996 (1979). None of those opinions suggests that President Carter was immune from the suit, which concerned his official action of terminating the United States's treaty with Taiwan. Insofar as immunity is a threshold doctrine, one would have expected to see it raised if the government thought it applied.

[7] On the contrary, Professor Tribe joined a group of other academics who signed the Memorandum *Amicus Curiae* of Law Professors submitted in support of the plaintiff in *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990). The brief is reprinted at 27 Stanford J. Int'l L. 257 (1991). This submission argued that relief should be afforded directly against the President of the United States, relating to the execution of his warmaking responsibilities as Commander-in-Chief. Surely if the President is amenable to suit in his official capacity over such weighty issues, there is no constitutional bar to his being a defendant in this case, in which relief will not relate in any way to the execution of his official duties.

[8] A number of other precedents, both in and out of court, show that Presidents have been directed to provide testimony. These authori-

sion that the President is not amenable to judicial process would make achievement of this important goal impossible.[9]

III. SEPARATION OF POWERS PRINCIPLES REQUIRE THAT THE PRESIDENT BE SHIELDED ONLY FROM SPECIFIC DEMANDS ON HIS TIME THAT WOULD ACTUALLY INTERFERE WITH HIS DUTIES

Because we believe that *Fitzgerald* does not speak to the question before this Court, we submit that the appropriate resolution of the President's immunity claim should be guided by other separation of powers cases, dealing with the President's amenability to process and with the standards governing separation of powers disputes. Those standards, we submit, make clear that this case should be permitted to go forward now.

Although the burdens of the presidency are great, there is simply no longer room for the argument advanced in the collection of quotations offered by the Solicitor General from

ties are directly relevant to the pending immunity claim, because they speak to the question whether the President's duties prevent his compliance with the orders of a court. The conclusion in each of these instances was that his duties were no basis for excusing him from such compliance. See generally **I Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law: Substance and Procedure** (West Pub. 2d ed. 1992) § 7.3. At § 7.1, the same Treatise lists voluntary and involuntary presidential appearances going back 200 years. See *id.* at 571-583.

[9] Significantly for present purposes, the government's response to this development has been neither public protest nor explicit agreement, but silent acquiescence. In the clearest and most elaborate appellate holding of which we are aware that the President can be named as a defendant when necessary, the government obeyed a court of appeals decision requiring the President to afford relief, and did not petition for certiorari. *National Treasury Employees Union, supra*. This is consistent with the fact that, before this Court as in the court below, the Solicitor General has not joined in the constitutional argument advanced by the President's personal counsel. Inasmuch as one of the Solicitor General's most important functions is to defend the Constitutional powers and prerogatives of the presidency, his refusal to make this argument is quite telling.

scholars and the memoirs of presidents:[10] as Chief Justice Marshall observed when he upheld the subpoena to President Jefferson, the office's "demand is not unremitting." *United States v. Burr*, 25 F. Cas. 30, 34 (CC Va. 1807).[11] This Court's cases dealing with the separation of powers, like lower federal court cases focused specifically on the President's amenability to judicial process, make clear that the appropriate inquiry in evaluating a claim of presidential immunity is whether the specific presidential conduct sought will actually interfere with the President's execution of the duties of his office. A generalized assertion like the one offered here, that whole categories of cases pose too great a burden because the President is too busy to attend to them, is not enough to justify the suspension of personal responsibility for which the President asks.

[10] See Brief of the United States as *Amicus Curiae* at 10-12.

[11] President Jefferson is one of the authorities commonly cited (see, e.g., Brief of Petitioner at 16; Amicus Brief of Law Professors at 13) for the proposition that Presidents are not amenable to judicial process. Jefferson insisted no subpoena should have issued in *Burr*, and he said his subsequent release of the documents there demanded was "voluntary." See generally 9 **The Writings of Thomas Jefferson** (Ford ed.) 63-64. Chief Justice Marshall, however, disagreed with Jefferson; held him amenable to process; and ordered him to produce the documents. Because "it is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803), Chief Justice Marshall has prevailed in this disagreement, which is why this Court followed his view, and not Jefferson's, in *United States v. Nixon*. See *id.*, 418 U.S. at, *e.g.*, 713.

A. Under General Separation Of Powers Principles, Immunity From Suit Regarding Private Conduct Can Be Justified Only If President Clinton Can Show That His Amenability To Suit Would Actually Interfere With The Fulfillment Of the Duties Of His Office

As Justice Powell explained in his concurrence in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 963 (1983), "the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683 (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." The first of these two inquiries is the relevant one here: President Clinton argues that subjecting him to suit while in office would interfere unduly with the performance of his official functions.

In *Nixon v. GSA*, the Court articulated this standard, and applied it to resolve whether a challenged action "interfere[s] impermissibly with [another branch's] performance of its constitutionally assigned function:"

> in determining whether [a challenged act] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S., at 71-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443. See also *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (question is "the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions") (quoting *Nixon v. GSA*, 433 U.S. at 443).

In *Nixon v. GSA* the Court upheld a statute stripping former President Nixon of control over his presidential papers, because he could not show that the challenged provisions would disrupt the conduct of duty by the Executive Branch. Similarly, in *United States v. Nixon*, the Court required the President to provide subpoenaed documents, in large part because no specific claim had been made of a "need to protect military, diplomatic or sensitive national security secrets." Rather, the claimed privilege was said to "depend[ ] solely upon the broad, undifferentiated claim of public interest in the confidentiality of [presidential] conversations." 418 U.S. at 706. This generalized assertion of privilege, this Court held, had to yield to the prosecutor's demand for information in connection with a simple criminal trial.[12]

Because no specific burden on President Clinton is yet at issue in this case, these precedents require the Court to attach significantly less weight to the President's claim of immunity. To demonstrate the need for protection from suit while in office at this threshold stage of the case, the President must

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12 Ignoring all of the above law, the President's academic amici assert that the burden is on the plaintiff to justify the assertion of judicial power over the Mr. Clinton, and they quote a line from *United States v. Nixon* in which the Court explained that it had ordered Mr. Nixon to produce evidence because there had been a "demonstrated, specific need for evidence." Brief Amicus Curiae of Law Professors at 13. Amicis' use of this short quote ignores the central fact that this Court in that case had required such a showing only ***after*** it had satisfied itself, by reviewing a number of directly applicable precedents, that a presidential privilege existed (in the confidentiality of ***official*** papers). Once such a privilege is found to exist, a party seeking to overcome it must indeed explain why the privilege has to yield. Here, however, the issue is the antecedent question ***whether*** the immunity claimed exists in the first place. The law, as we discuss above, is that, to prove the existence of this or any other privilege, the party asserting it must show why it is necessary to enable him to carry out his official duties. The assertion to the contrary by the President's amici is thus incorrect.

offer more than a hypothetical assertion of interference with his ability to perform his constitutionally assigned functions. If this litigation proceeds and the President complains of undue burden, the district court has ample discretion to adjust the proceedings for good cause, to consider motions to limit discovery, and otherwise to protect the presidency.

B. Cases Dealing With The President's Amenability To Process Also Require The President To Make A Specific Showing Of Conflict With His Duties In Order To Escape Any Particular Court Order

When Chief Justice Marshall upheld the subpoena to President Jefferson, he noted that a court can protect the President from being harassed by vexatious and unnecessary subpoenas by its conduct after rather than before issuance. *United States v. Burr*, 25 F. Cas. 30, 34 (CC Va. 1807). See also *United States v. Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990) (while "it is settled that a President, whether former or incumbent, may be subpoenaed to be a witness in judicial proceedings in an appropriate case," courts have attempted "to exercise this power in a way that would be least damaging to the Presidency or onerous to the particular individual occupying the Office, to the extent that this was possible and consistent with the rights of the litigant who was in need of such testimony"). This approach "balances the accountability of the President with the practical demands of his office; it gives the courts the discretion to evaluate a President's claim of hardship in the context of particular demands and to adjust his ordinary obligations to the legal system in light of those hardships." Ray, *supra*, 80 Ky L.J. at 812.

This approach fits with the way this Court has analyzed other, analogous separation of powers problems, see *Nixon v. GSA*, *supra*; *Mistretta v. United States*, *supra*, and we therefore submit that this is in fact the appropriate inquiry: to avoid a particular kind of judicial process President Clinton must point to a specific form of interference in the conduct of

his duties that would be caused if such process issued.[13] A mere general assertion that he will be forced to spend all of his time attending to private legal obligations is not sufficient.[14]

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[13] Once he identifies a specific action required of him, however, and a specific reason why he cannot perform it, the proof he need offer to justify adjustment of the burden need not be overwhelming. In *United States v. Nixon* the Court emphasized that it would show "the utmost deference" when national interests are asserted as a reason for the courts to lift a litigation burden from the President. 418 U.S. at 710. Similarly, a district court should alter the timing or scope of discovery sought from the President on the basis of his assertion of "a facially legitimate and bona fide reason" for such a change. See, *e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Consistently with this standard, the courts have quite properly been deferential to a President's assertion that a particular presidential action cannot be performed as, or when, requested. See *infra* Part IV.

[14] It is within Congress's power under the Necessary and Proper clause of Article I to authorize other protection for the President if the legislature were to deem it necessary, such as indemnifying the President from the costs of a civil suit if he prevails. (A similar protection is afforded by the Ethics in Government Act, 28 U.S.C. § 593(f).) The legislature exercised this very power when it enacted the Soldier's and Sailor's Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-91. That act—which does not protect the President or other civilians who govern the military, such as the Secretary of Defense—represents the sort of immunity for which the President asks.

Congress's decision not to insulate the President in this way should be respected. As Justice Jackson explained in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (emphasis added), the President's powers are at their lowest level when he claims prerogatives "incompatible with the expressed ***or implied*** will of Congress." We submit that the legislature's decision not to protect the President from civil suit, even temporarily during a period of national emergency, represents a judgment that should not be second-guessed by this Court.

Finally, we note that Congress is also the appropriate source of any protection necessary from the possibility that the action of a state court might threaten the office of the presidency or the fulfillment of presidential duties. The current removal provision, 28 U.S.C. § 1442, authorizes the removal of certain actions against federal officials. The doctrine of protective jurisdiction may well go further than this statute, as the

IV. A WIDE VARIETY OF TOOLS IS AVAILABLE TO THE COURT TO PREVENT THE USE OF LITIGATION AS A TOOL OF HARASSMENT

There is probably no federal court in which baseless cases have not been filed against public officials for improper motives, including even the plaintiffs' opposition to the defendants' substantive policies. See, *e.g.*, *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (damages action against, inter alia, President Reagan and British Prime Minister John Major for their order that certain targets in Libya be bombed). Many such cases can be dismissed for failure to state a claim. See *id.*; *Komasinski v. Internal Revenue Service*, 588 F. Supp. 974 (N.D. Ind. 1984) (dismissing suit for failure to state a claim and for bad faith in using a complaint to advance a political, rather than a legal claim).[15] In addition, if appropriate, sanctions may be imposed on the litigants and/or their counsel. See *Saltany*, 886 F.2d at 440; *Komasinski*, 588 F. Supp. at 979 (requiring individual plaintiff to pay attorney's fees to government defendants because action was brought "for philosophical reasons rather than because of a sincere belief that a right had been violated").[16]

Solicitor General acknowledges. See Brief of the United States at 29, n. 20. Even if neither of these tools were sufficient to protect any presidential interest actually endangered by a state court suit, Congress is clearly empowered to extend federal removal jurisdiction to include such cases.

[15] See also 28 U.S.C. § 1915(d) (authorizing dismissal of in forma pauperis cases when the court is satisfied that the action is frivolous or malicious).

[16] President Clinton argues that the mere act of opening the courthouse door to private actions will cause an avalanche of such cases, and that people who are substantively opposed to a particular President's platform will use the courts to attempt to embarrass the President politically and to frustrate his efforts to implement the platform on which he was elected. The President implies that this case is indeed such an effort.

We note, however, that there has been no such deluge until now. We perceive no basis for predicting one in the future. Moreover, we have no way of knowing what the plaintiff's reasons are for prosecuting this case. We believe strongly, however, that they are irrelevant to the question now before this Court. If it is meritorious, this case should go forward, and the plaintiff should prevail, on the same time schedule she would face if she were suing anyone else, subject to the adjustments that are demonstrably necessary to accommodate the President's duties—adjustments, we wish to emphasize, that courts can and should make. If the case is meritless, and instead a political vendetta of some kind, the courts have many established tools for dealing with it, which are used often and successfully against baseless cases brought for improper motives against public officials. Use of these tools is vastly better than the law the President asks this Court to make: that he is unaccountable for his private actions precisely when his power is at its zenith.

The standard rules governing the subjection of the President to legal process are also capable of dealing with cases alleging conduct witnessed only by the plaintiff and defendant, and which may therefore be more difficult to dispose of on a threshold motion. Indeed, Section 1983 claims are often brought for actions witnessed only by the plaintiff and defendant—an archetypical example is the charge of police brutality. The courts have responded to this problem not by barring such cases but by imposing heightened pleading requirements and by an increased willingness to dispose of such cases on summary judgment. See, *e.g.*, *Arnold v. Jones*, 891 F.2d 1370 (8th Cir. 1989); *Martin v. Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987).[17] There is no reason why analogous requirements could not be imposed here. Similarly, discovery from the President might only be permitted if a plaintiff can offer corroboration of some kind that his or her claims have a factual basis.

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[17] While a heightened pleading requirement was rejected in *Leatherman v. Tarran County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 , 166 (1993) for municipalities, this Court noted that "unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983." See, *e.g.*, *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (suggesting that a plaintiff against whom qualified immunity has been invoked can be required to file a reply, pursuant to Fed.R.Civ.P. 7, explaining why the immunity does not apply on the facts at issue).

In the same vein, it has long been the law that discovery from the President may only be had if no other source is available for the same material. See, *e.g.*, *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989); *United States v. Mitchell*, 385 F. Supp. 1190 (D.D.C. 1974), *aff'd sub nom. United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (per curiam), *cert. denied*, 431 U.S. 933 (1977); *cf. United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (the party seeking documentary discovery from the President must clearly establish its materiality). Indeed, changes made to Federal Rules of Civil Procedure 26-37 by the 1983 and 1993 amendments empower—and indeed oblige—the district courts to prevent harassing discovery against any party, even one less exalted than Mr. Clinton.

Similarly, the President's personal attendance at a trial has, to our knowledge, never been required; now that videotape depositions are available there is little reason to expect that such attendance would ever be necessary in any but the most singular circumstances. See *United States v. Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975).[18] Documents subpoenaed from the President are routinely scrutinized *in camera* for relevance, as required by *United States v. Nixon*, and nonresponsive material is not turned over to the discovering party. *United States v. Nixon*, 418 U.S. at 715-716; *United States v. Poindexter*, 732 F. Supp. 135 (D.D.C. 1990). In *Poindexter*, President Reagan was also given the unusual right to have his

[18] The President's personal counsel argue that, as a practical matter, the accusations in this case are so important that he will have to attend the trial, and devote substantial personal time to preparation, even though he will not be legally obliged to do so. As this argument acknowledges, however, this is a function of the importance of the allegations Ms. Jones has made: if the allegations had been made in some other forum, such as a book or magazine article, their rebuttal would presumably also require the President's attention. Clearly the President cannot be shielded from most such demands on his time. The fact that these allegations happen to take the form of litigation does not, we believe, make them any different.

counsel review the defendant's ex parte submissions to the court setting out his discovery plan and defense strategy. 732 F. Supp. 163, 164 (D.D.C. 1990).[19]

Similarly, in *Degan v. United States*, 116 S.Ct. 1777 (1996) this Court noted that "the District Court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require. Fed.Rule Civ. Proc. 26(c)." *Id.* at 1782. In language directly applicable to this case, in which immunity has been claimed at the very outset of the proceeding and on an entirely empty record, the Court observed that "the details of these [protective] steps are committed to the discretion of the district court; it would be premature to consider now the precise measures the court should adopt as the case proceeds." *Ibid.*

The president argues that even allowing a district court to use these discretionary tools will provoke a constitutional confrontation between the executive and judicial branches: his proposed solution is to avoid the confrontation by having the courts yield entirely for as long as he occupies the White House. The argument is wrong-headed for two reasons. First,

[19] The availability of these unique protections shows that analogy to the criminal context, which both the President and the Solicitor General offer as a tool for analysis, is inappropriate. Criminal prosecution of a sitting President is problematic because imprisonment would quite clearly prevent the President from doing his job. A flexible order that, at some time convenient to the President, he sit for his deposition, is simply not the same thing. This President and others have in fact been questioned in legal proceedings without any untoward consequences. And it is important to observe that no other Order normally issued in a civil trial would compel the personal attendance of any individual party (including, of course, the President) at any hearing or other event. There is thus little danger that the trial court would ever have any need to make an extended or burdensome demand on the President's time. And yet only such a demand could give rise to the kind of problem that the President and his amici say make this case an impermissible threat to the execution of his official duties.

no constitutional confrontation will arise between the two branches, so long as the trial court before which the action is pending is appropriately deferential of the President's duties—and if the trial court were to mistakenly fail to provide such deference, a mandamus petition would clearly be the appropriate recourse. Such procedure, we believe, is vastly superior than the blanket rule that those people injured by someone who later becomes President are stripped of the right even to gather the evidence they will need to prove their claim for as long as the person who injured them remains in office.

The President's argument is also misguided because it ignores this Court's consistent warning of the danger of allowing a single branch to determine unilaterally the scope of its own inherent powers. "The extent of [inherent] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen*, 116 S.Ct. at 1780. "A [branch's] inherent power is limited by the necessity giving rise to its exercise." If there is "no necessity to justify the" exercise of inherent power at issue, then it is not permissible. *Id.* at 1783.

V. THE TEMPORAL IMMUNITY PRESIDENT CLINTON SEEKS IS FUNDAMENTALLY INCONSISTENT WITH THE CONSTITUTION'S EFFORT TO ENSURE THAT ALL OF THE POWERS IT CONFERS ARE CHECKED AND BALANCED

Perhaps the most important theme of the Constitution's separation of powers is that every grant of power must be counterbalanced by an effective, contemporaneous, corresponding restraint: the doctrine pervades the architecture of the Constitution in order "to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). One profoundly important

restraint binding the President, who participates in the creation of federal law and superintends its execution, is that he is bound by that law equally while he wields those great powers as when he does not. The provisions invoked in the complaint in this case—42 U.S.C. § 1983, and the Equal Protection and Due Process clauses of the Fourteenth Amendment—are part of this law. For precisely this reason "[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Davis v. Passman*, 442 U.S. 228, 246 (1979), quoting *United States v. Lee*, 106 U.S. 196, 220 (1882).

Obedience is enforced by the courts, often at the behest of the people the law was designed to protect, rather than by the government acting on their behalf. The President's obedience is no less necessary—and no less important to the Nation—because compelled in this way. As Senator Pinckney explained from the well of the Senate many years ago, commenting on his own and his colleagues' work at the Federal Convention with respect to the question of the immunity accorded federal officials:

> [The Federal Convention] never meant that the body who ought to be the purest, and the least in want of shelter from the operation of laws equally affecting all their fellow citizens, should be able to avoid them; they therefore not only intended, but did confine their privileges within the narrow limits mentioned in the Constitution.

3 M. Farrand, The Records of the Federal Convention of 1787 at 385 (1966).

CONCLUSION

Although the separation of powers doctrine exists as our "greatest security against tyranny," *Mistretta v. United States*,

488 U.S. at 381, many disputes about the doctrine are far removed from any real threat of the exercise of unconstrained power. See, *e.g.*, *Bowsher v. Synar, supra*; *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). The temporal immunity President Clinton claims here, however, would eliminate the only mechanism that now formally enforces his obedience to the law he is empowered to execute for the entire time he holds that great power in his hands. The important laws at issue in this case are among those he is charged with enforcing, and there is no reason why he should be able to shield himself now from accountability.

This Court's cases clearly place upon the President the burden to explain why the license he seeks is necessary. We believe he has not borne that burden. Rather than issuing one broad-brush ruling, liberating this President and every successor from the obligation to respond in court like everyone else, we submit that this Court should require the President to explain how any particular demand of him in this case would interfere with his ongoing obligations. Instead of categorically consigning this plaintiff to legal limbo for years, the trial court can then use its discretion to prevent any disruption of the presidency from this plaintiff's efforts to enforce her rights.

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